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MICHAEL RODAK, JR., CLERK

No. 72-1620

In the
Supreme Court of the United States

OCTOBER TERM, 1973

In the Matter of the Petition of
O.L. SCHMIDT BARGE LINES, INC., as
Owner of the M/V MARY R for Exoneration
from or Limitation of Liability.

On Petition For Writ of Certiorari To The
United States Court of Appeals
For the Seventh Circuit

BRIEF OF RESPONDENT, O.L. SCHMIDT BARGE LINES, INC. IN OPPOSITION TO THE PETITION OF JOSEPH MOSS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TABLE OF CONTENTS

PAGE

Argument

I. O.L. Schmidt Barge Lines, Inc., Is Not A Joint Petitioner For A Writ Of Certiorari .. 1

II. The Issue Presented For Review By Petitioner Joseph Moss Does Not Constitute A Justiciable Case Or Controversy 2

Conclusion 4

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ARGUMENT

I.

O.L. SCHMIDT BARGE LINES, INC., IS NOT A JOINT PETITIONER FOR A WRIT OF CERTIORARI.

Petitioner, Joseph Moss, has captioned his Petition for a Writ of Certiorari, as follows:

"In the case of GEORGE O'DONNELL, SR., Administrator of the ESTATE OF GEORGE O'DONNEL, JR., Deceased,

Respondent,

vs.

O.L. SCHMIDT BARGE LINE and JOSEPH MOSS,
Petitioners,

Interpleaded in:
IN THE MATTER OF THE PETITION OF:
O.L. SCHMIDT BARGE LINES, INC., as Owner of the Motor Vessel MARY R for Exoneration from or Limitation of Liability."

This caption implies that O.L. Schmidt Barge Lines, Inc. (hereinafter "Schmidt") and Joseph Moss are petitioning for a writ of certiorari. This is not correct. Schmidt was granted a decree of exoneration by the United States District Court for the Northern District of Illinois, Eastern Division, Civil Action No. 69 C 377, the Honorable Abraham L. Marovitz, District Judge, presiding. On March 7, 1973, the United States Court of Appeals for the Seventh Circuit filed its Opinion in consolidated appeals nos. 71-1498, 71-1499 and 71-1500, affirming the Findings of Fact and Conclusions of Law of the District Court.

Schmidt, having prevailed in both the trial and appellate courts, does not petition for a writ of certiorari.

II.

THE ISSUE PRESENTED FOR REVIEW BY PETITIONER JOSEPH MOSS DOES NOT CONSTITUTE A JUSTICIABLE CASE OR CONTROVERSY.

Petitioner, Joseph Moss, has presented a single issue for review, which is:

"Should admiralty law be modernized to require a lookout on a barge in areas having marinas and known to be frequented by small pleasure craft?"

Respondent, Schmidt, submits that this is no issue at all, because the law is clear that a lookout is always required on every vessel in navigation. Both the trial court and the Seventh Circuit recognized this requirement and went on to apply the maritime legal principle that the absence of a lookout will not cast a vessel in fault in those circumstances where he could not have seen the other vessel in sufficient time to avoid the collision. Affirming the District Court on this issue, the Court of Appeals stated:

"An examination of the record shows that the pilings and center pier of the bridge effectively obstructed the view which a lookout stationed at the head of the barge would have had of the Moss boat until seconds before the collision. The precise amount of time can be estimated at somewhere from one to five seconds on the basis of evidence as to the location at which the collision occurred (five to twenty feet west of the northwest pile cluster) and the testimony of the occupants of the motorboat that they did not see the barge until two to five seconds before the collision. Under these circumstances, the finding that Toomey's absence from the head of the barge was immaterial and could not have been a contributing cause of the collision is substantially supported by the evidence. *Therefore, even if there was a breach of the duty to keep a proper lookout, the fact that a lookout could not have prevented the collision precludes a finding of liability on that basis.* Tidewater Associated Oil Co. v. United States; 60 F. Supp. 376 (S.D. Calif. 1945); The Bouker No. 2, 254 F. 579 (2nd Cir. 1918); The Transfer No. 21, 248 F. 459 (5th Cir. 1918) . . ." (Page 4a of Moss Petition) (Emphasis supplied)

There is no legal issue to be decided by this court. It was never held, as Moss's single "Issue" implies, that a lookout was not required. The district court found as a fact that in the circumstances of this case, the absence of a lookout could not have contributed to cause the collision. The appellate court correctly affirmed.

The trial court found that the gross faults of Moss (who petitions for certiorari herein) were "glaring", and were sufficient in themselves to account for the collision, and found that Moss and his negligently operated outboard motorboat were solely at fault. The Court of Appeals properly affirmed the Findings of Fact and Conclusions of Law.

CONCLUSION

We submit that there is no justiciable issue presented for review by this court. The Petition of Joseph Moss should be denied.

Respectfully submitted.

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